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In the Supreme Court of the United States

OCTOBER TERM, 1987

J. E. MCNEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in sustaining the district court's imposition against her of sanctions, under Rule 11 of the Federal Rules of Civil Procedure, for advancing unwarranted arguments on behalf of her client in the district court.

1. a. Petitioner's client, Joan W. Oehser, filed a federal income tax return for 1983 on which she claimed a "conscientious military deduction" in the amount of $4,704, which was based on her asserted religious beliefs that prohibited her from supporting the military in any form. On receipt of Oehser's return, the Internal Revenue Service (IRS) assessed a $500 civil penalty under Section 6702 of the Internal Revenue Code.[1] Pet. App. 1a. That Section authorizes the assessment of a $500 civil penalty on the filing of a tax return that either fails to set forth sufficient information "on which the substantial correctness

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

of the self-assessment may be judged" or "contains information that on its face indicates that the self-assessment is substantially incorrect," provided such conduct is due either to "a position which is frivolous" or to "a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws."

Oehser paid 15% of the assessed penalty ($75) and sought a refund.[2] After her administrative claim for refund was denied, petitioner, an attorney, instituted this refund suit on Oehser's behalf in the United States District Court for the District of Columbia. The complaint alleged that the penalty violated Oehser's Fifth Amendment right to procedural due process in failing to provide a predeprivation hearing, that it violated the Administrative Procedure Act because it was based on guidelines that had not been published in the Federal Register, that Section 6702 is unconstitutionally vague, that the penalty denied her equal protection under the Fifth Amendment, that it violated the First Amendment, and that it violated her right to "freedom of conscience" under the First, Fifth, and Ninth Amendments. Pet. App. 1a-2a, 8a. The government moved to dismiss for failure to state a claim, and, in addition, sought an award of attorney's fees as a sanction under Rule 11 of the Federal Rules of Civil Procedure. See Pet. App. 7a.

b. The district court granted the government's motion to dismiss and also imposed Rule 11 sanctions (Pet. App. 7a-10a). The court found that a "conscientious military deduction" was not even arguably allowable and therefore

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[2] Ordinarily, full payment of an assessment is a prerequisite to the filing of a refund suit. See *Flora* v. *United States*, 357 U.S. 63 (1958), aff'd on rehearing, 362 U.S. 145 (1960). Section 6703(c) of the Code, however, permits a refund suit to be brought to challenge a penalty imposed under Section 6702 after payment of only 15% of the penalty.

that Oehser's self-assessment on her return was "substantially incorrect and * * * patently frivolous" (*id.* at 8a). The district court further concluded that sanctions should be imposed upon petitioner under Rule 11, which provides that an attorney's signature on a pleading is a certification "that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

The court explained that a reasonable inquiry into the case law would have disclosed at least this Court's decision in *United States* v. *Lee*, 455 U.S. 252 (1982), and possibly the numerous court of appeals decisions rejecting arguments identical to those raised by petitioner in Oehser's complaint. In any event, these court of appeals cases were called to petitioner's attention in the government's brief in support of its motion to dismiss, but petitioner failed to address those cases in her reply.[3] Hence, the court concluded that sanctions were appropriate because it did not appear that the pleadings filed by petitioner were based on a belief formed after "reasonable inquiry" that the arguments were well-founded. Pet. App. 9a-10a. Subsequently, the court denied a motion for

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[3] The court noted that petitioner had cited one of the relevant court of appeals cases, but concluded that she had "completely misstated the holding of the case" (Pet. App. 10a n.1). Petitioner had cited *Jenney* v. *United States*, 581 F. Supp. 1309 (C.D. Cal. 1984), rev'd, 755 F.2d 1384 (9th Cir. 1985), in support of her contentions even though the district court's decision invalidating the Section 6702 penalty had been reversed on appeal. Petitioner also addressed *Lee* briefly and cited one other court of appeals opinion (*Kahn* v. *United States*, 753 F.2d 1208 (3d Cir. 1985)), although she acknowledged that latter decision as adverse authority on only one of the numerous contentions on which it was contrary to Oehser's contentions.

reconsideration (*id.* at 12a-13a). After discussing in further detail the insubstantiality of Oehser's contentions, the court concluded (*id.* at 13a): "An examination of plaintiff's counsel's contentions in filing the complaint in this action and the arguments made in her brief in opposition to the motion to dismiss, showed that her arguments were neither well-argued nor well-founded." Subsequently, the court determined that the amount of the sanctions should be $278.68 in attorney's fees paid to the government (*id.* at 14a).[4]

c. The court of appeals affirmed the district court's decision in all respects in an unpublished memorandum (Pet. App. 1a-6a).[5] With respect to the Rule 11 sanctions,

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[4] The district court's order establishing the amount of the sanctions contained a clerical error. Although the order noted that the court had "previously awarded attorney's fees to the government," the final line ordered "that *plaintiffs* are awarded attorney's fees in the amount of $278.68" (Pet. App. 14a (emphasis added)). The government filed a motion under Fed. R. Civ. P. 60(a) to correct this error, and the court granted the motion and entered a new order (Pet. App. 15a). This order, however, also contains a clerical error. Although the court's various orders and opinions respecting the imposition of Rule 11 sanctions made clear that they were imposed against petitioner, not her client (see *id.* at 10a, 11a, 12a), the second order stated that "the *plaintiff* is directed to pay" the sanctions (*id.* at 15a (emphasis added)). The government made a second motion to correct the order to require that the sanctions be paid by petitioner, but the district court has not yet acted on that motion.

[5] There is a substantial question whether, because petitioner failed to file a notice of appeal, the court of appeals lacked jurisdiction of petitioner's appeal from the imposition of sanctions. The notice of appeal, which was signed by petitioner on Oehser's behalf, stated only that appeal was taken by "Joan W. Oehser, plaintiff above named" (C.A. App. 94) and thus on its face indicated an appeal only of the Section 6702 penalty imposed against Oehser, not an appeal by petitioner herself of the sanctions imposed against her. The court of appeals, however, denied the government's motion to dismiss the appeal for lack of jurisdiction, stating that "[t]he intent of plaintiff's counsel

the court explained that it was "clear enough that a reasonable attorney could not have concluded, after 'reasonable inquiry,' that the claims advanced were 'warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law' " (*id.* at 3a (footnote omitted)). The court rejected petitioner's contention that sanctions could not be imposed because there was no circuit precedent directly on point, noting that there was "no *per se* rule * * * exempting from sanctions any claim for which there is no controlling case law in the circuit" (*ibid.*). Looking to the "totality of circumstances"—both the "legal insufficiency of the arguments" raised by petitioner and her "inadequate discussion of adverse precedent"—the court of appeals found it clear that Rule 11 sanctions were appropriate (*id.* at 3a-4a).

2. The court of appeals correctly held that Rule 11 sanctions were appropriate here, and its decision does not conflict with any decision of this Court or of another court of appeals. Indeed, the courts of appeals have frequently imposed appellate sanctions in connection with challenges

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to appeal the sanctions portion of the order can be fairly inferred from the notice, and there is no evidence that the government was misled by the mistake" (Pet. App. 16a).

We note that petitioner is incorrect in suggesting (Pet. 8 n.3) that such a jurisdictional defect could be corrected by the filing of a new notice of appeal after the district court enters a new order correcting the clerical error in its order establishing the amount of the sanctions (see note 4, *supra*). It is well settled that orders on Rule 60(a) motions to correct clerical errors do not commence a new period for taking an appeal to challenge the merits of the judgment. See, *e.g.*, *St. Paul Fire & Marine Ins. Co.* v. *Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982); *Albers* v. *Gant*, 435 F.2d 146, 148 (5th Cir. 1970); see Fed. R. App. P. 4(a). Accordingly, there is no reason for this Court to consider granting petitioner's alternative request to vacate the judgment of the court of appeals so that she can institute a new appeal.

to the imposition of Section 6702 penalties.[6] And this Court has declined to review a ruling upholding the imposition of Rule 11 sanctions upon an attorney challenging a Section 6702 penalty imposed for filing a "war tax" return. See *Warren* v. *United States*, cert. denied, No. 86-1191 (Apr. 20, 1987). There is no more reason for the Court to grant certiorari here than there was in *Warren*.[7]

Rule 11 permits the district courts to award costs and fees against an attorney or a pro se litigant for filing a pleading where a pre-filing inquiry would have indicated no basis for a good-faith assertion of the position taken therein. The Rule 11 standard, since its amendment in 1983, is one of objective reasonableness. See, *e.g.*, *Indianapolis Colts* v. *Mayor and City Council*, 775 F.2d 177, 181 (7th Cir. 1985); *Eastway Constr. Co.* v. *City of New York*, 762 F.2d 243, 253-254 (2d Cir. 1985), cert. denied, No. 87-359 (Oct. 19, 1987). Inquiry by petitioner into the meaning of Section 6702 would have shown that Oehser's "war tax" return fell squarely within its coverage. The Senate Report (1 S. Rep. 97-494, 97th Cong., 2d Sess. 277-278 (1982)) makes clear that the Section was designed

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[6] See *Dalton* v. *United States*, 800 F.2d 1316 (4th Cir. 1986), cert. denied *sub nom. Warren* v. *United States*, No. 86-1191 (Apr. 20, 1987) ("war tax" deduction); see also *Sisemore* v. *United States*, 797 F.2d 268 (6th Cir. 1986); *Coleman* v. *Commissioner*, 791 F.2d 68 (7th Cir. 1986); *Eicher* v. *United States*, 774 F.2d 27 (1st Cir. 1985); *Ricket* v. *United States*, 773 F.2d 1214 (11th Cir. 1985); *Hudson* v. *United States*, 766 F.2d 1288 (9th Cir. 1985); *Paulson* v. *United States*, 758 F.2d 61 (2d Cir. 1985).

[7] Indeed, petitioner's claim is even weaker than that in *Warren*. The thrust of the petitioner's argument there was that sanctions were inappropriate because the complaint had been filed before the court of appeals had entered its decision reversing the district court in *Jenney* v. *United States*, 581 F. Supp. 1309 (C.D. Cal. 1984), rev'd, 755 F.2d 1384 (9th Cir. 1985), and thus there was at least one unreversed court decision that supported the contentions raised in the complaint. That is not the case here where the Ninth Circuit had already reversed in *Jenney* before petitioner even filed the complaint on behalf of Oehser.

to deter the filing of tax protest returns. Specifically, the Senate Report states (*id.* at 278) that the Section 6702 penalty applies, inter alia, whenever a taxpayer files:

> a "return" showing an incorrect tax due, or a reduced tax due, because of the individual's claim of a clearly unallowable deduction, such as * * * a "war tax" deduction under which the taxpayer reduces his taxable income or shows a reduced tax due by that individual's estimate of the amount of his taxes going to the Defense Department budget * * *.

Thus, it clearly was Congress's intent to penalize the filing of returns such as Oehser's. Moreover, as the district court noted on reconsideration (Pet. App. 12a), petitioner's acknowledgement that Oehser never maintained the legitimacy of the "war tax" deduction amounted to an admission that the Section 6702 penalty was applicable.

The clear applicability of Section 6702 should have been evident to petitioner from a brief examination of relevant court authority. As the court of appeals noted (Pet. App. 4a), at the time petitioner filed the complaint in this case, four courts of appeals had already sustained the imposition of Section 6702 penalties for filing returns containing "war tax" deductions and had rejected arguments virtually identical to those advanced in this case as to the constitutionality of Section 6702. See *Wall* v. *United States*, 756 F.2d 52 (8th Cir. 1985); *Jenney* v. *United States*, 755 F.2d 1384 (9th Cir. 1985); *Kahn* v. *United States*, 753 F.2d 1208 (3d Cir. 1985); *Welch* v. *United States*, 750 F.2d 1101 (1st Cir. 1985). After the filing of the complaint, but prior to the time when petitioner filed the reply to the government's motion to dismiss, two more decisions rejecting similar claims were entered. See *Carey* v. *United States*, 765 F.2d 138 (4th Cir. 1985) (an unpublished decision in a

case in which petitioner served as co-counsel); *Franklet* v. *United States*, 761 F.2d 529 (9th Cir. 1985). Petitioner's determination to pursue this action in the face of the clear contrary authority in the congressional materials and other courts, without making any serious effort to argue why that authority should not be followed, plainly justified the court's imposition of Rule 11 sanctions.

3. Petitioner argues (Pet. 11-13, 20) that the decision below is in "direct conflict" with *Golden Eagle Distributing Corp.* v. *Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986), but there manifestly is no conflict between the decisions. In *Golden Eagle*, the district court had recognized that the argument made by counsel was "a worthy one to advance," but it imposed Rule 11 sanctions because of "the manner in which the position was advocated," notably, counsel's failure to cite certain cases that were arguably contrary to its position but that counsel maintained were distinguishable (*id.* at 1535). The court of appeals reversed, finding that the district court's approach excessively diminished the lawyer's role as an advocate. The court explained that Rule 11 does not impose "a requirement that the lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable" (*id.* at 1542). The court of appeals was careful to note, however, that the district courts still retained considerable authority to impose Rule 11 sanctions (*ibid.*): "[W]e do not suggest that the court is powerless to sanction lawyers who take positions which cannot be supported. A lawyer should not be able to proceed with impunity in real or feigned ignorance of authorities which render his argument meritless."

Clearly, this case is not comparable to *Golden Eagle*. Here, the district court found that sanctions were justified because petitioner's "arguments were neither well-argued nor well-founded" (Pet. App. 13a). Contrary to petitioner's assertion (Pet. 12-13), the sanctions were not upheld solely because of the manner in which a worthy argument was presented, as was the case in *Golden Eagle*. Instead, the court of appeals below looked to the failure to discuss contrary authority, which had already been cited by the government, only as part of the "totality of circumstances" (Pet. App. 3a-4a) in which the legal insufficiency of petitioner's arguments coupled with her failure to discuss the only court of appeals cases that were on point (albeit adversely) demonstrated a lack of a " 'good faith argument' " (*id.* at 4a). In short, there is no tension whatsoever between *Golden Eagle* and the decision below.[8]

4. Nor is there merit in petitioner's suggestion (Pet. 13-15) that the imposition of sanctions is inappropriate here because of a "chilling effect" on First Amendment rights. As petitioner herself notes (*id.* at 14), every lawsuit can be said to invoke a First Amendment right to petition the government for the redress of grievances. Thus, peti-

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[8] By the same token, the decision below is fully consistent with the other court of appeals' decisions relied upon by petitioner. Most of those cases (see Pet. 11-13) *upheld* the imposition of sanctions where, like here, the pleadings did not appear to be based on a good faith belief, after reasonable inquiry, that the position espoused was justified under the Rule 11 standards. The court of appeals found that all of the claims raised by petitioner were "wholly without merit" (Pet. App. 3a)—a conclusion that cannot seriously be disputed. Therefore, the decision below does not in any way conflict with the principle that it is possible in a single case for some of the arguments made by counsel to justify Rule 11 sanctions while others do not (see Pet. 15-16).

tioner's First Amendment objection appears to be little more than a general claim that Rule 11 is unconstitutional.[9] The simple answer is that there is no First Amendment right to bring frivolous lawsuits, even where the government is the defendant. See *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743 (1983).[10]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[9] Petitioner's claim that this case is special because Oehser's filing of the "war tax" return assertedly was an exercise of her First Amendment rights (see Pet. 14-15) is essentially an attempt to argue the merits of the imposition of the Section 6702 penalty, an argument that is not raised in the questions presented and that the courts below correctly rejected as wholly without merit. There is plainly no basis either in Rule 11 or in the Constitution for suggesting that attorneys are immune from Rule 11 sanctions when they file frivolous pleadings in cases that allegedly have First Amendment overtones.

[10] There is no basis for petitioner's contention (Pet. 16-17) that she has been denied due process because of the courts' alleged "shifting of the basis for sanctions" (*id.* at 17). The district court held that her arguments were "neither well-argued nor well-founded" (Pet. App. 13a), and the court of appeals affirmed on the same ground (*id.* at 4a). And both courts found relevant to the lack of good faith the fact that petitioner made little effort to address the contrary authority cited by the government that was directly on point (see *id.* at 3a n.2, 4a, 10a & n.1, 13a).

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